The Commonwealth of Massachusetts

AERONAUTICS COMMISSION

10 Park Plaza, Room 6620

Boston, Massachusetts 02116-3

DIRECTOR'S OFFICE
(617) 973-8881

FACSIMILE
(617) 973-8889

October 22, 1997

Office of the Secretary
Federal Communications Division
Washington, DC 20554

RE: MM Docket Number 97-182
Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities

Dear Sir/Madam:

The Massachusetts Aeronautics Commission (MAC) vigorously opposes the preemption of state and local zoning and land use restrictions on the siting, placement, modification and construction of broadcast station transmission facilities, hereinafter referred to as the "Preemption", for the following reasons:

1. **The time deadlines for a state or local government or instrumentality thereof to act are unrealistic.** Normally, required Notices of Proposed Construction or Alteration are required to be sent to the appropriate FAA official at least thirty (30) days before the earlier of the following dates: (i) the date the proposed construction or alteration is to begin; or, (ii) the date an application for a construction permit is filed. The exception to this requirement is that notices relating to proposed construction or alteration that is subject to the licensing requirements of the Federal Communications Act may be sent to the FAA at the same time the application for construction is filed with the Federal Communications Commission, or at any time before that filing. (14 CFR 77.17) The combined effect of the proposed Preemption rule and the aforesaid aviation regulation is that state and local governments would be forced routinely to make a ruling on the application prior to having the benefit of the FAA's determination of whether the construction or alteration poses a hazard to air navigation. Furthermore, the proposed Preemption rule would: (a) force state and local governments to alter long-standing and reasonably efficient procedures and schedules to comply with the deadlines; or, (b) provide an incentive for a state or local government to be less willing to waive minor procedural or administrative flaws in applications. The former is an egregious infringement upon the rights of states and localities to protect the legitimate interests of their citizens; the latter thwarts the intent to have an efficient, timely DTV buildout.
2. **The modified, relocated or new transmission facilities could represent hazards to air navigation.** The Federal Aviation Administration (FAA) requires airport sponsors who receive a federal grant from the FAA under the Airport Improvement Program (AIP) to execute and comply with certain Assurances. Assurance Number 20 requires airport

sponsors to "take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards." Assurance Number 21 requires airport sponsors to "take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of airport to activities and purposes compatible with normal airport operations, including the landing and takeoff of aircraft". Many airport sponsors are municipalities. The Preemption would frustrate the efforts of airport sponsors to comply with the aforesaid federal Assurances.

3. **The Preemption undermines federal, state and local safety initiatives.** Significant time and monies are expended on an annual basis to protect instrument and visual operations to the airport (including established minimum flight altitudes) by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and preventing the establishment or creation of future airport hazards. In our state alone, we estimate that upwards of $5,000,000 will be spent over the next five (5) years to remove vegetation from protected airspace. Given the clear federal and state mandate to protect the flying public and the limited availability of federal, state and local funding for these safety projects, expediting the siting, placement, modification and construction of broadcast station transmission facilities without due regard for the protection of airspace and the significant past, present and future federal, state and local investments in protecting that airspace will increase the risk for unsafe conditions at airports and fiscal irresponsibility.
4. **The proposed Preemption rule is inconsistent with certain policies of the United States.** It is a national policy to undertake airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic so that safety and efficiency increase and delays decrease (49 U.S.C. 47101(a)(7)). Similarly, it is a national policy that the FAA's Airport Improvement Program should be administered to encourage projects that employ innovative technology, concepts and approaches that will promote safety, capacity and efficiency improvements in the construction of airports and in the air transportation system (49 U.S.C. 47101(a)(11)). Careful analysis would lead to the conclusion that the proposed Preemption rule is inconsistent with the national policy to encourage the development of transportation systems that use various modes of transportation in a way that will serve the States and local communities efficiently and effectively (49 U.S.C. 47101(a)(5) The proposed Preemption rule enhances the opportunity for the construction of transmission facilities that reduce safety, efficiency and capacity, thereby frustrating the efforts of federal, state and local governments to fully comply with said national policies.

We appreciate the opportunity to submit our comments on the proposed Preemption rule.

Sincerely yours,

Sherman W. "Whip" Saltmarsh, Jr.

Sherman W. "Whip" Saltmarsh, Jr.
Chairman

AGENDA ITEM # 3.7

MASSACHUSETTS AERONAUTICS COMMISSION **MEMORANDUM**

TO: Chairman Sherman W. "Whip" Saltmarsh, Jr.

COPIES: Vice Chairman James M. Slattery
Commissioner Henry J. Crouse
Commissioner James C. Fullerton
Commissioner William "T" Thompson

FROM: Stephen R. Muench

DATE: October 14, 1997

SUBJECT: **TALL TOWERS**

Attached hereto are:

1. a proposed letter from you to the Federal Communications Commission (FCC) opposing a propose rule that would expedite the siting, placement, modification and construction of broadcast station transmission facilities throughout the United States; and,

2. the Notice of Proposed Rulemaking (NPRM) (MM Docket No. 97-182).

Copies of the NPRM were distributed to Airport Commissioners and Airport Managers at the annual meeting of the Massachusetts Airport Management Association (MAMA) in Sturbridge earlier this month. We are expecting a relatively large turnout for our Commission Meeting on October 22, 1997. Therefore, we respectfully ask that you call this matter to the attention of those attending our Meeting and that you urge them to join with the MAC in its opposition to the proposed rule by sending their comments to the FCC and their Legislators. To be considered by the FCC, the original and four copies of the comments must be delivered to the FCC on or before October 30, 1997 at the following address:

Office of the Secretary
Federal Communications Division
Washington, DC 20554

RE: MM Docket Number 97-182
Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities

DOCKET FILE COPY ORIGINAL

WILLIAM F. SPITZER
Vice President Development

WABU-TV

October 27, 1997

BOSTON UNIVERSITY
COMMUNICATIONS, INC.

1660 Soldiers Field Road
Boston, Massachusetts 02135
617/787-6868
617/562-4280 fax

Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, DC 20554

Re: MM Docket No. 97-182
Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities

Dear Mr. Secretary:

Boston University Communications, Inc. (BUCI) is the licensee of WABU(TV), CH 68, Boston, and two satellite television stations, WZBU, CH 58, Vineyard Haven, MA, and WNBU, CH 21, Concord, NH, serving the Boston television market.

BUCI acquired the satellite stations, both of which had been off the air for years, as part of its quest to achieve over-the-air signal parity with the other stations in the market. In doing so, it carries the added burden of operating three separate transmitter and antenna sites. As a result, the Commission's present proceedings with respect to transmission facilities is of even greater importance to BUCI than it would be for most TV stations.

This issue is made even more pressing by the current situation BUCI faces with respect to its Vineyard Haven station (WZBU). The tower owner from whom BUCI leases its tower space has been attempting for more than one year, to obtain permission from the local zoning board to replace the present tower which sustained damage during repair work. The tower owner has requested permission to build a new replacement tower of the same height, on the same parcel of land, immediately adjacent to the existing tower. However, in the course of reviewing the original building permit, the Building Commissioner has determined that the existing structure is 431 feet tall whereas the original 1969 building permit was for a tower of 220 feet.

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Irrespective of the circumstances surrounding how the existing tower's height increased from its original height to the present height, the fact remains the tower has been at the current height since at least 1993 when BUCI obtained the license for the station and entered into an agreement to resume transmission from the very same location the station had previously used before it went off the air.

The tower owner has been trying for over a year to obtain the required approvals to replace the tower and a decision is still pending. The local zoning board may also consider approving a permit that would limit the height of the replacement tower to that of the original building permit, this, despite the fact that an approval of an equal height replacement tower would not constitute any change in the existing visual impact that has existed for at least three years.

We have no reason to believe the delay and uncertainty evident in this situation would not be exacerbated many fold if, instead of a replacement tower, we sought a new DTV tower site.

We wholeheartedly endorse the Commission's proposed Rule Making regarding the preemption of state and local restrictions with respect to the placement, construction and modification of broadcasting facilities. It is the only way the proposed transition to DTV has any prospect of being implemented in a timely manner.

Respectfully submitted,

William F. Spitzer
Vice President Development

DOCKET FILE COPY ORIGINAL

Jeffrey D. Johnson
County Administrator

MONTGOMERY COUNTY BOARD OF SUPERVISORS

1 East Main Street, Suite 325 • Christiansburg, Virginia 24073-3027

October 28, 1997

William F. Caton,
Acting Secretary
Office of the Secretary
Room 222
Federal Communications Commission
1919 M Street, NW
Washington, D. C. 20554

RE: FCC RULEMAKING DOCKET 97-182
Preemption of Local Zoning over Television and Radio Broadcast Towers

Dear Mr. Caton:

At their meeting of October 27, 1997, the Montgomery County, Virginia, Board of Supervisors passed the enclosed resolution regarding the FCC proposed rulemaking under Docket 97-182. The Board strongly opposes the intent to preempt local zoning for television and radio broadcast towers.

Please incorporate this resolution with the comments received on Rulemaking Docket 97-187.

Sincerely,

Jeffrey D. Johnson
County Administrator

JDJ

Attachment

Telephone (540) 382-6954
FAX: (540) 382-6943

AT AN ADJOURNED MEETING OF THE BOARD OF SUPERVISORS OF MONTGOMERY COUNTY, VIRGINIA HELD ON THE 27TH DAY OF OCTOBER, 1997 AT 7:00 P.M. IN THE BOARD CHAMBERS, COUNTY COURTHOUSE, CHRISTIANSBURG, VIRGINIA:

On a motion by Ira D. Long, seconded by Mary W. Biggs and carried unanimously,

WHEREAS, The Federal Communications Commission (FCC) has issued FCC Rule Making Docket 97-182, Preemption of local zoning over television and radio broadcast towers;

WHEREAS, Land use is a function of local government to preserve citizen participation in decisions regarding the use of land within their community;

WHEREAS, The FCC rule making Docket 97-187, usurps the power and authority of local governments to control land use and zoning in their communities; thereby excluding citizens from the decision-making process in the use of land in their communities;

WHEREAS, Local governments are best positioned to identify the adverse impacts such towers may have on the residences, scenic assets, historic districts and the environment of their local communities;

WHEREAS, The Virginia Association of Counties (VACo) and the National Association of Counties (NACO) oppose FCC Rule Making Docket 97-187;

NOW THEREFORE, BE IT RESOLVED, By the Board of Supervisors of Montgomery County, Virginia as follows:

1. The Board strongly opposes FCC Rule Making Docket 97-182, Preemption of local zoning over television and radio broadcast towers.

2. The Board strongly supports the position of NACO and VACo too preserve local zoning authority; and

3. The Board strongly believes it should be the authority of local government to decide the use of land within its communities.

ATTEST: _____
COUNTY ADMINISTRATOR

6582 Main Street
P.O. Box 329

County of Gloucester

COUNTY ADMINISTRATOR
Gloucester, Virginia
23061-0329

(804) 693-4042
FAX (804) 693-6004

October 28, 1997

Mr. William F. Caton, Acting Secretary
Office of the Secretary, Room 222
Federal Communications Commission
1919 M. Street, NW
Washington, DC 20554

Dear Mr. Caton:

It is my understanding that the Federal Communications Commission is now considering a rule (Docket No. 97-182) that would preempt local zoning authority over television and radio broadcast towers. This rule is apparently being developed because of the new digital television technology that, in some cases, will require towers which are nearly one half mile high. Gloucester County, Virginia is opposed to this important land use decision being made in Washington, rather than in local communities across this nation.

Historically, issues of land use have been decided in the local meeting rooms of governing bodies in this nation . Local governing bodies are certainly best able to make such decisions with input from their constituents. The taking of this basic responsibility of local governments is simply wrong. Our citizens don't realize the impact that this decision could have if such a tower is considered for their neighborhood. Once they realize what could take place, they will feel more alienated from their government than before the decision was made.

On behalf of the Gloucester County Board of Supervisors, I ask that you not enact this rule. Let those of us in local government do what we have been elected and appointed to do; govern our localities.

Thank you for your attention to this letter.

Sincerely,

William H. Whitley
County Administrator

WHW:ss

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COMMITTEE ON THE BUDGET
SPECIAL COMMITTEE ON AGING
DEMOCRATIC POLICY COMMITTEE

United States Senate

WASHINGTON, DC 20510–4904

October 29, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, NW Rm 222
Washington, D.C. 20554

To whom it may concern:

Attached are comments regarding MM Docket #97-182 submitted by the Milwaukee Regional Cable Commission. Please include these comments in the Record for this rulemaking.

Sincerely,

Russ Feingold

Russ Feingold

C

○ 8383 GREENWAY BOULEVARD
MIDDLETON, WI 53562
(608) 828–1200
(608) 828–1215 (TDD)

○ 517 E. WISCONSIN AVENUE
ROOM 408
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(414) 276–7282

○ 317 FIRST STREET
ROOM 107
WAUSAU, WI 54403
(715) 848–5660

○ 425 STATE STREET
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LA CROSSE, WI 54601
(608) 782–5585

○ 1640 MAIN STREET
GREEN BAY, WI 54302
(414) 465–7508

MILWAUKEE REGIONAL CABLE COMMISSION

REF: MM Docket #97-182

Office of the Secretary
Federal Communication Commission
1919 M Street NW Rm 222
Washington, DC 20554

Delivered by hand.

Please find comments regarding MM Docket #97-182, in the matter of preemption of state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities.

Additional copies to follow by Airborne.

Sincerely,

Bob Chernow

October 29, 1997

In the matter of Preemption of State & Local Zoning &
Land Use Restrictions on the Siting, Placement & Construction
of Broadcast Station Transmission Facilities

FCC 97-296

MM Docket # 97-182

The communities of the MRCC object to your proposed rule making which would preempt local zoning and land use restrictions. We object for the following reasons:

First, there are practical reasons why local governments regulate zoning. We need to co-ordinate all utilities for public safety, and we need to consider the character of our communities and the wishes of our citizens. Your proposed rule violates the principles of Federalism which recognizes zoning as being an unique local concern.

Second, there is an additional economic burden placed upon local communities when businesses open up our roads and other public facilities which then need to be repaired. When regulated public utilities were monopolies which offered universal service, this extra cost could be justified. In today's environment, many businesses are cherry picking their customers and have many services which are not regulated. In short, these are competitive businesses who offer no needed universal service. Why should the FCC favor one business over another when the cost to community is its loss of governance?

Third, you state that "it is incumbent upon the Commission not to 'unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives.'" It could be debated that the FCC does not have the legal right to preempt our zoning ordnances, but it is hypocritical of the Commission to pass rules when it benefits from the sale of Digital Television Service (DTV) licenses and when the FCC has adopted its own artificial and accelerated roll-out schedule for DTV. Importantly, the FCC is relying on anecdotal evidence to press its case and would throw out the processes we use locally to inform our citizens and to give them and us the opportunity to study variances to our local zoning and land use. Is there a military pressing the immediate use of DTV or is it a business and entertainment requirement that go through the "inconveniences " of local democracy.

Four, is the FCC using a meat axe to kill a fly. Your time limits are unrealistic and bear no relation to the procedural requirements of state and local law, the requirements of due process or zoning law. You disregard property values, historic districts, aesthetics and safety rules.

There is no pressing public need to have the FCC co-opt local zoning and land use. In addition, there is no "right" to do so under federal law. But if there was a pressing public need and so called FCC "right", the FCC has a serious conflict of interest in that sales are generated from licensing fees. Therefore, a neutral system should be set up with the burden of proof required by the DTV, not by the municipality, and a time horizon more closely akin to how local governments function.

Lastly, the FCC has shown itself not to be friendly to the interests of local government or the citizens that we serve. Complaints that were issued to the FCC against Warner Cable, for instance, were terminated and became a "social contract" whereby Warner Cable could raise rate annually to pay for their new fiber optics system with little or no benefit accruing to their subscribers.

Robert Chernow
Chair

MRCC
8230 N Pelican Lane
River Hills, Wisconsin 53217

cc Senator Russ Feingold
Senator Herb Kohl
Congressman Tom Barrett
Congressman Jerry Kleczka
Congressman Jim Sensenbrenner
Ron Kuisis (City of Milwaukee)
Barry Orton (University of Wisconsin)

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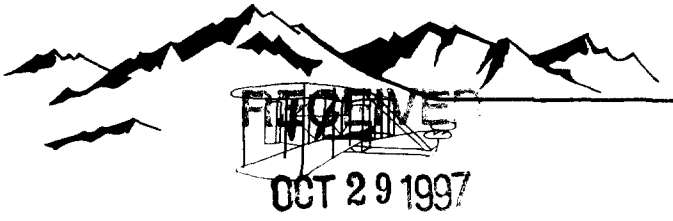

ALASKA AIRMEN'S ASSOCIATION., INC.

October 22, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street NW
Washington, DC 200554

Attention: Docket No. FCC 97-182

Dear Mr. Secretary,

The Alaska Airmen's Association, Inc. (AAAI) which represents the General Aviation community in Alaska, strongly opposes the FCC Notice of Proposed Rule Making (NPRM) which proposes to preempt State and Local Zoning and Land Use laws on the sitting, placement and construction of broadcast transmission facilities. We join with the Aircraft Owners and Pilots Association (AOPA) in their opposition and direct your attention to their very complete and well researched, and well reasoned comments, on this matter. (Copy enclosed)

We further strongly object to any Federal Agency attempting to preempt and overturn regulations and laws which are clearly the sole prerogative of State and Local governments. The potential for encroachment on airspace around airports is a serious matter of great concern to the aviation community, both the flying public and the people who operate there own aircraft. Local zoning regulations have worked well for many years to keep in check potential airspace encroachments around important community airports and to provide for the fullest local hearings on such matters.

This FCC NPRM is clearly not in the public interest nor in the interest of safe aviation operations. We ask that our comments be made part of the Public Record.

Sincerely

John Spalding
President

cc: Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young
AOPA President Phil Boyer

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September 29, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 200554

Attention: Docket No. FCC 97-182

To whom it may concern:

The Aircraft Owners and Pilots Association (AOPA) representing over 340,000 aircraft owners and pilots nationwide is opposed to the Notice of Proposed Rule Making (NPRM); *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Transmission Facilities.* The general aviation community is the largest population of airspace and airport users in the United States and have a significant interest in the safety and efficiency of the National Airspace System(NAS). AOPA strongly opposes this NPRM on the grounds that preemption of state and local zoning laws, ordinances and regulations will result in new hazards to aerial operations, aircraft, and passengers in the Unites States.

Because of an arbitrary and aggressive implementation schedule, the proponents of Digital Television (DTV) consider state and local zoning as obstacles to their artificially imposed time constraints. For this reason, the industry petitioned the Federal Communications Commission (FCC) for the above referenced NPRM that would essentially circumvent well established state and local zoning protection.

Accelerated implementation of DTV should not be accomplished at the expense of the flying public and it would be an oversimplification to state that current state and local zoning unreasonably delay broadcast facilities construction. (II, Background, .4 , page 2-3). Federally mandated "time limits" cannot be enforced nor expected to be complied with in a standardized manner all across the country. The principle as described in the NPRM proposes to remove from local consideration regulations based on the environmental or health effects of radio frequencies emissions, interference with other telecommunication signals, and would also remove from local consideration regulations concerning tower marking and lighting provided that the facility complies with applicable Commission or FAA regulations. As provided for in the NPRM, the proposed changes **are related to the health and safety of the flying public** (II, Background, .4, page 2-3).

This proposed rule creates a fundamental conflict of interest within the federal government. The government has established obstruction related standards to ensure public safety on one hand and bypass that same system and its enforceability links with state and local governments on the other, in an attempt to facilitate the implementation of DTV.

The NPRM states that the Commission had the authority to preempt where state or local law stands as an obstacle (III, Discussion, .6, page 3) to the accomplishment and execution of the full objectives of Congress. This creates a conflict of interest when compared to the mandated authority and role that Congress has instituted with the Federal Aviation Administration (FAA) in terms of aviation safety.

The 1996 Telecommunications Act and associated 47 U.S.C. 151 do not justify, mandate or even insinuate that state and local zoning is to be ignored. "To make available, so far as possible..." should not include or be attempted at the expense of aviation safety. Again, 47 U.S.C. 151 "It shall be the policy of the United States to encourage the provision of new technologies and services to the public" certainly does not intend to achieve it at the expense of state and local zoning, especially when it relates to airport and aviation safety. (III, Discussion, .7, page 4). The fact that historically the FCC has sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement is illustrative of not only common sense, but also mirrors previous congressional policy (III, Discussion, .8, page 4).

Airports are endangered by constant encroachment of the approach and departure slopes by towers or other vertical obstructions which are impediments to airport safety clearances. Obstructions can be caused by terrain, buildings, towers, and trees or any object that penetrates what can be defined as navigable airspace. Penetrations to navigable airspace may cause unsafe conditions at an airport and may have to be removed, lowered or reconstructed. In many cases, this cannot be accomplished without local and state intervention and guidance, hence the impact of the FCC NPRM.

Since 1928, zoning has been the answer to the problem of airport protection from obstructions. In 1930, the Department of Commerce recommended: "Municipalities and other political subdivisions authorize to do so, exercise the police power in promulgation of properly coordinated zoning ordinances applying equitably to the public airports and intermediate landing fields, and to commercial airports of the public utility class, as well as other land uses."

This same concern was vividly made public again in 1938 by the Civil Aeronautic Authority (CAA) when it mentioned: "..and, solutions to these problems that have been suggested, there is none as satisfactory, in many respects, as airport zoning." Following federal leadership in this domain, many states since then have adopted legislation authorizing cities and counties to adopt regulations and ordinances limiting the height of structures around airports. By 1941, 31 states had this type of legislation enacted. Many more do today. While things have changed since 1930, they have changed for the better, not for the worse. The federal government position on airport and land use compatibility zoning has been very consistent in the last 60 years.

Today, 49 U.S.C. Section 44718 states, in pertinent part, that "The Secretary of Transportation shall require a person to give adequate public notice...of the construction or alteration, establishment or extension, or the proposed construction, alteration, establishment or expansion, of any structure...when the notice will promote: safety in air commerce, and the efficient use and preservation of the navigable airspace and of airport capacity at public-use airports."

The FAA utilizes Federal Aviation Regulation (FAR) Part 77, CFR 14, "Objects Affecting Navigable Airspace" in an effort to establish standards for determining obstruction to air navigation. In addition to Part 77, the FAA has published documentation of which the purpose is to supplement Part 77. Examples are: Advisory Circular 70/7460-2J "Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace" and Advisory Circular 150/5190-4A, "A Model Zoning Ordinance to Limit Height of Objects Around Airports." These documents are designed to promulgate safety standards.

However, the Federal Aviation Act of 1958, as amended, does not provide specific authority for the FAA to regulate or control how land may be used involving structures or obstructions that may penetrate the navigable airspace. The Federal Aviation Regulations Part 77 only requires "...all persons to give adequate public notice...of construction or alteration...where notice will promote safety in air commerce." The FAA has no power to enforce obstruction standards.

The Advisory Circulars published by the FAA are evidence that the FAA is unable to provide enforcement for situations that arise and have made efforts for the local governments to be informed about the responsibilities they have to establish zoning ordinances.

By examining the statutes relative to the FAA, we can confirm that there is no specific authorization for federal regulations which would limit structure heights, prohibit construction or even require structures to be obstruction marked and lighted. Congress chose to withhold such authority. Since it would involve federal zoning regulations and due process actions, including the taking of property and the paying of compensation, **the matter was best left with the states and the local authorities.** This federal void is filled by state and local authorities. States and local governments have the responsibility of enacting and enforcing airport-compatible land use.

Given the relative ineffectiveness of the current FAR Part 77 and the advisory nature of the other documentation, it is essential that state and local authorities maintain their ability to adequately regulate tall structures. The FCC NPRM discourages the state and local governments from filling in the federal voids to protect their airports and citizens. We believe that the safety and welfare of persons above and on the ground in the vicinity of airports should be a matter of **coordinated** federal, state, and local concern. The Federal government established the standards and recommendations, the state and local governments enforce them.

AOPA believes that another federal agency (FCC) should not attempt to do what the federal aviation agency cannot in terms of obstruction related aviation matters. The FCC NPRM has serious aviation consequences and therefore cannot ignore those entities (federal, state, and local) that not only have the expertise, but also the legal right to define obstructions that impact on navigable airspace, especially around **their** airports.

To protect the public by preventing properly located and constructed airports from becoming worthless through construction or growth of hazards or obstructions in and around such airports, state and local governments all point to zoning to limit the location and height of structures. A state, county, city, airport authority, corporation or individual can spend large sums of money for very essential public and private purpose of constructing and maintaining an adequate airport, only to have the airport rendered worthless and dangerous almost overnight by the erection of obstructions despite adequate and safe state and local zoning laws and regulations, and violating a myriad of these in the process.

Throughout the nation, local zoning and ordinances are the only means to enforce and limit the height of obstructions to airspace and aerial navigation near airports. AOPA is and has worked with state legislatures to improve existing laws and to establish new ones to limit the construction of tall structures that would be dangerous to aviation.

We also encourage local governments to adopt ordinances and land-use codes that protect navigable airspace, especially in the proximity of airports. This has successfully been achieved in some states where, beyond providing specific guidelines for airport land use compatibility and implementation of airport land use regulations, the state requires permits for any penetration to the FAR Part 77 surfaces. The end result is that local political subdivisions are required to adopt zoning to require a variance for any penetration to the Part 77 and to require appropriate lighting/marking as a condition of such variances. Examples like these represent the best, the safest and most efficient coordinated usage of federal standards, state law, and local ordinances.

While the arrangement between the two federal agencies can be considered a "gentleman's agreement," they both have to face the validity of the airport zoning statutes, which incorporate the basic legal principles which sustain the validity of the zoning. These are now firmly established in the legal jurisprudence of the majority of the states in this nation.

It would be inaccurate to believe that because FAA's Part 77 Regulations and associated processes such as notices of proposed constructions and aeronautical studies are not affected nor mentioned in the NPRM, that the NPRM's impact is non-existent in terms of safety of aerial navigation. This NPRM fails to consider that state and local zoning address and safeguard aerial navigation in cases where FAR Part 77 fails to require FAA notification.

The cases where Part 77 **Does Not** require FAA notification include:
(1) construction or alteration of LESS than 200 feet, (2) proposed construction of a tower less than 200 feet yet in the vicinity of airports privately owned/operated, (3) objects that are shielded by another object (This may lead to a gradual crawl towards an airport. Each tower is built just a little closer and soon there are 20 of them.), and (4) an addition in height of 20 feet or less to an existing antenna structure.

Furthermore, state and local laws and ordinances are the only protection the flying public has when the towers or obstructions in question are not even considered to be an obstruction under FAR Part 77. The cases where FAR Part 77 **Does Not** Consider to be an Obstacle are: (1) a height of 499 feet or less and (2) a height of 499 feet when right beside a private use airport.

Lastly, FAR Part 77 **Does Not** Consider the following in Determining if an Obstacle is a Hazard to Air Navigation: (1) when a VFR flyway is used many times for a week or two per year, yet not consistently on a daily basis, (2) the future form of navigating via direct (Free Flight Concept) is not addressed in the consideration (Off-airways flying is being utilized more now than ever and will be the primary way to navigate within the next 10-15 years), (3) FAR Part 137 Operations, (4) VFR Military Training Routes (MTR) (this is significant to GA because these MTRs are wider than depicted, and when navigating in the vicinity of an MTR, less attention is paid to the obstructions on the ground, it is also more significant now than ever due to the shortage of airspace the military has to utilize training procedures.), (5) any operation conducted under a waiver or exemption to the FAR's (pipeline patrol, power line patrol), (6) high Density Training Areas, (7) raising the Approach minimums at an airport served by only that one approach, and (8) raising a Minimum Obstruction Clearance Altitude (MOCA) to height of the Minimum En route Altitude (MEA) is OK if there aren't any plans to lower the MEA to MOCA height.

As it can been seen in these three instances, the elimination of certain state and local powers to analyze, regulate, and enforce aviation obstructions and zoning issues not only when covered by FAR Part 77, but also when not covered by these same regulations, will result in a loss of accountability for public safety and cripple state and local government's ability to zone themselves.

State and local governments define hazards contrary to public interest by finding that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also may in effect reduce the size of the area available for landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public and private investment therein. This understanding is the prevailing idea of zoning; to protect and preserve the health, safety and welfare of the communities in question.

If the FCC NPRM is implemented, many airport sponsors across the country will find themselves dealing with a fait accompli. This will prompt FAA's requirements in obstruction standards to be applied in order to mitigate the impact of the obstruction forced upon them at their own cost. These same standards, lacking enforceability to protect the airspace, are depending on state and local laws to be effective, finds themselves useless other than being used for the purpose of now forcing airports to pay for the safety of the flying public. The safety of the flying public was already addressed initially.

If serious constructive consideration is to be given to the petitioners request and intention with regards to DTV, it is imperative that these same entities find alternative and cooperative ways to work with both state and local government and agencies instead of forcing upon them another level of federal use of Commerce Power. This is a very serious matter when it is associated with FCC's tendency to overturn FAA determinations of hazards based on appeals and information submitted by construction proponents. **Accelerated implementation of DTV for commercial and business purposes cannot and should not be accomplished at the expense of the safety of the flying public.**

The protection of airport approaches from dangerous obstructions is a pressing legal problem. Furthermore, AOPA believes that actual implementation of the requested regulatory changes will undoubtedly and literally create hundreds if not thousands of legal conflicts all across the country. **This will not result in faster implementation of DTV in the United States.**

We thank you for the opportunity to provide these comments.

Sincerely,

Phil Boyer
President